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Supreme Court, U.S.
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No. 05-11304

IN THE
SUPREME COURT OF THE UNITED STATES

LAROYCE LATHAIR SMITH,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Court of Criminal Appeals of Texas

RESPONDENT'S MOTION TO SUPPLEMENT BRIEF IN OPPOSITION AND SUPPLEMENTAL BRIEF IN OPPOSITION

SUPPLEMENTAL

BILL HILL
Criminal District Attorney
Dallas County

LISA SMITH
Deputy Chief, Appellate Division

*KIMBERLY A. SCHAEFER
Assistant District Attorney
Dallas County District Attorney's Office

133 N. Industrial Blvd., LB-19
Dallas, Texas 75207-4399
(214) 653-3639

*Counsel of Record

ATTORNEYS FOR RESPONDENT

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To the Honorable Justices of the Supreme Court of the United States:

RESPONDENT'S MOTION TO SUPPLEMENT

This certiorari proceeding arises from a state habeas corpus appeal brought by Petitioner LaRoyce Lathair Smith. On September 5, 2006, the State timely filed its Brief in Opposition. On that day, briefs were also filed by two amici curiae in support of Smith's petition.[1] Smith subsequently used material in the amicus briefs to file a Reply Brief on September 13, 2006. Smith's Reply Brief also discussed, for the first time, a federal case issued in March of 2006. The State moves for leave to supplement its Brief in Opposition in order to discuss the new case law presented by Smith and amici.

SUPPLEMENTAL BRIEF

Smith and amici's portrayal of the Texas Court of Criminal Appeals' (CCA) *Penry* jurisprudence is disingenuous. Smith and amici may not rely on a body of case law developed by the CCA between 1989 and 2004 to condemn the CCA's opinion in this case as "inconsistent" in its application of a harm analysis. Significant changes occurred in Texas's *Penry* jurisprudence when this Court issued *Penry II* in 2001 and *Tennard* in 2004, rendering the CCA's former analysis of *Penry* error obsolete. Moreover, Smith also misrepresents the law in Texas regarding jury charge error. Generally speaking, claims of charge error and *Penry* error in particular are not defaulted by the failure to object at trial. The CCA's failure to discuss procedural default in this case, either before or after

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[1] Amicus briefs were filed on behalf of the Constitution Project, an anti-death penalty group, and four former federal appellate judges.

remand, is therefore not equivalent to a rejection of a procedural default argument by the CCA.

ARGUMENT

I. Smith agrees that the error in this case is subject to harmless error review.

In his reply brief, Smith concedes that the appropriate inquiry on remand was an assessment of the record for harm. Reply Brief, p. 2. Neither Smith nor amici contend that the jury charge error in this case was structural error or somehow immune from a harmless error analysis. Thus, all the parties concur that the charge error in this case is subject to a harm analysis. This consensus on the law is easily confirmed by the prior opinions of this Court.

In *Mitchell v. Esparza,* this Court held that jury charge error can be subject to a harmless error review, even in death penalty cases. *See Mitchell v. Esparza*, 540 U.S. 12, 16-17 (2003) (per curiam) (holding that the failure to instruct the jury on all the statutory elements of the offense is subject to harmless error review). Moreover, it is the general custom of this Court to leave it to the state courts on remand to consider whether an error is, in fact, harmless. *Lilly v. Virginia*, 527 U.S. 116, 139-40 (1999) (noting on remand that the Supreme Court leaves it to the state court to consider in the first instance whether Sixth Amendment error was harmless under *Chapman*); *see also Calderon v. Coleman*, 525 U.S. 141, 146-47 (1998) (holding that federal court could not grant habeas relief upon a finding of *Penry*-like charge error without conducting harm inquiry under *Brecht v. Abrahamson*, 507 U.S. 619 (1993)). Thus, the CCA's performance of a harm analysis

on remand, after a finding of error by this Court, accords with the usual practice before this Court and is not an "underhanded," "tactical maneuver" devised to avoid this Court's decision on the merits, as Smith and amici incorrectly claim.

II. Smith and amici misrepresent the CCA's *Penry* jurisprudence between 1989 and 2004

It is undeniable that a harmless error review on remand is both encouraged and proper under the foregoing law. Thus, the only recourse for Smith and amici is to persuade this Court that the analysis conducted by the CCA on remand was not a harmless error analysis but something else. To do so, counsel for Smith and amici allege that the CCA created an ad hoc procedural bar in the guise of a harmless error analysis never before implemented for *Penry* error. Smith's Reply Brief, p. 13; Appellate Judges' Amicus Brief, p. 9-10; Constitution Project Amicus Brief, p. 15.

In fact, the CCA has never hesitated to apply the *Almanza* egregious harm analysis, in the absence of a trial objection, to all types of charge error in death penalty cases.[2] *See Almanza v. State*, 686 S.W.2d 157, 171-72 (Tex. Crim. App. 1984) (op. on

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[2] *See, e.g., Scheanette v. State*, 144 S.W.3d 503, 507-08 (Tex. Crim. App. 2004) (concluding that improper wording of mitigation special issue would require showing of egregious harm under *Almanza*); *Herron v. State*, 86 S.W.3d 621, 631-34 (Tex. Crim. App. 2002) (analyzing failure to give accomplice-witness instruction under *Almanza* egregious harm standard); *Ortiz v. State*, 93 S.W.3d 79, 90-92 (Tex. Crim. App. 2002) (analyzing trial court's reliance on wrong statute under *Almanza* egregious harm analysis); *Feldman v. State*, 71 S.W.3d 738, 756-57 (Tex. Crim. App. 2002) (concluding erroneous parole charge instruction did not cause egregious harm under *Almanza*); *Ovalle v. State*, 13 S.W.3d 774, 785-88 (Tex. Crim. App. 2000) (analyzing incomplete punishment charge for egregious harm under *Almanza*); *Medina v. State*, 7 S.W.3d 633, 638 (Tex. Crim. App. 1999) (finding no egregious harm under *Almanza* for improper instruction on transferred intent); *Cathey v. State*, 992 S.W.2d 460, 465-66 (Tex. Crim. App. 1999) (concluding defendant did not suffer egregious harm under *Almanza* from parties charge); *Green v. State*, 934 S.W.2d 92, 107-08 (Tex. Crim. App. 1996) (finding no egregious harm from "extra-statutory" charge on burden of proof).

reh'g) (establishing different harmless error reviews for objected-to and unobjected-to charge error). Despite the CCA's extensive history of applying the *Almanza* egregious harm analysis to a variety of unpreserved charge errors in death penalty cases, Smith and amici contend that the CCA has--for reasons unexplained--singled out *Penry* error, and declined to apply a harm analysis until it allegedly used it in this case to thwart this Court's intent on remand. Opposing counsel and amicus both cite the same string of Texas cases purportedly showing that the *Almanza* egregious harm standard has never before been applied in the analysis of a "*Penry*" claim, either to grant or deny relief. Smith's Reply Brief, p. 13; Appellate Judges' Amicus Brief, p. 9. Amicus then draws the "inescapable" conclusion that the CCA applied a harm analysis in this case "solely to avoid compliance with this Court's mandate and prevent further review by this Court." Appellate Judges' Amicus Brief, p. 9; *see also* Smith's Reply Brief, p. 15.

This "inescapable" conclusion is wrong. All of the cases cited by opposing counsel and amicus were decided before this Court issued its opinions in *Penry II* and *Tennard v. Dretke* .[3] *Tennard v. Dretke*, 542 U.S. 274 (2004); *Penry v. Johnson*, 532 U.S.

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[3] Opposing counsels cite the following reversals: *Ramirez v. State*, 815 S.W.2d 636 (Tex. Crim. App. 1991); *Ex parte Goodman*, 816 S.W.2d 383 (Tex. Crim. App.1991); *Ex parte McGee*, 817 S.W.2d 77 (Tex. Crim. App. 1991); *Ex parte Williams*, 833 S.W.2d 150 (Tex. Crim. App. 1992); *Rios v. State*, 846 S.W.2d 310 (Tex. Crim. App. 1992).

Opposing counsels cite the following affirmances: *Fuller (Tyrone) v. State*, 827 S.W.2d 919 (Tex. Crim. App. 1992); *Fuller (Aaron) v. State*, 829 S.W.2d 191 (Tex. Crim. App. 1992); *San Miguel v. State*, 864 S.W.2d 493 (Tex. Crim. App. 1993); *Robertson v. State*, 871 S.W.2d 701 (Tex. Crim. App. 1993); *Wheatfall v. State*, 882 S.W.2d 829 (Tex. Crim. App. 1994); *Smith v. State*, 898 S.W.2d 838 (Tex. Crim. App. 1995); *Mason v. State*, 905 S.W.2d 570 (Tex. Crim. App. 1995); *Heiselbetz v. State*, 906 S.W.2d 500 (Tex. Crim. App. 1995); *Goff v. State*, 931 S.W.2d 537 (Tex. Crim. App. 1996).

782 (2001) (*Penry II*). Opposing counsels fail to acknowledge that the errors committed by the CCA in this case *did not even exist until the opinions in Penry II and Tennard issued in 2001 and 2004,* respectively. This distinction is critical because it explains why the CCA's former case law contains no harmless error reviews.

Under the now-disavowed Fifth Circuit "screening test," the CCA's former analysis of *Penry I* claims contained a type of built-in harmless error analysis. Following the lead of the Fifth Circuit, the CCA did not find "error" under *Penry I* unless there was evidence that the defendant's crime was attributable to a uniquely severe, permanent handicap, not of his own making. *See Robertson v. Cockrell*, 325 F.3d 243, 251 (5th Cir. 2003) (overruled in part by *Tennard*); *e.g.*, *Mines v. State*, 852 S.W.2d 941, 951 (Tex. Crim. App. 1992) (citing *Lackey v. State*, 819 S.W.2d 111, 135, n.10 (Tex. Crim. App. 1989) (op. on reh'g); *Goss*, 826 S.W.2d at 164-66; *Nobles v. State,* 843 S.W.2d 503 (1992)).

This so-called screening test or nexus requirement was derived from Justice O'Connor's statement that underlying this Court's decision in *Penry I* was the principle that "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are *attributable* to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (*Penry I*) (emphasis added) (citing *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)); *see Ex parte Bower*, 823 S.W.2d 284, 286 (Tex.

Crim. App. 1991); *Lewis v. State*, 815 S.W.2d 560, 567 (Tex. Crim. App. 1991) (holding that *Penry I* analysis depends in the first instance upon whether proof of significant mitigating potential was actually placed in evidence).

Thus, a *Penry I* analysis began with a discussion of whether the evidence in the case was similar to the evidence in *Penry I*. *E.g.*, *Bower*, 823 S.W.2d at 286-87; *Lewis*, 815 S.W.2d at 567. In the absence of such evidence, the CCA simply concluded the statutory special issues were adequate, and no *Penry I* error existed. *Bower*, 823 S.W.2d at 287. If such evidence were found, however, reversal was automatic because the jury charge was necessarily constricted by the Texas special issues already found to be insufficient under such circumstances in *Penry I*.

So error under *Penry I* was more than mere charge error. It included a built-in finding that the jury was unable to consider evidence that showed the defendant's criminal act was attributable to a uniquely severe, permanent handicap, not of his own making, just like Penry's. Indeed, all of the *Penry I* reversals cited by Smith and amici are cases where, like Penry, the defendant presented evidence of mental retardation.[4] This analysis used by the CCA for claims of *Penry I* error rendered a harmless error review superfluous. If the defendant's evidence was deemed to be "*Penry* evidence," reversal was automatic because the case was legally and factually no different from *Penry I*.

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[4] *See Ramirez*, 815 S.W.2d at 656 (IQ score of 57); *Goodman*, 816 S.W.2d at 385-86 (IQ score of 56 and possible brain damage); *McGee*, 817 S.W.2d at 79-80 (IQ score of 66 and childhood abuse); *Williams*, 833 S.W.2d at 151-52 (IQ scores of 53 and 67); *Rios*, 846 S.W.2d at 315 (IQ scores of 55, 59, 66, and 67).

In failing to even acknowledge this screening approach to *Penry I* error, Smith and amici seem to take for granted that it was incorrect from its inception. But at the time it was used, it was not without support in the case law. As stated, it was derived from a direct quote in *Penry I*. Further, the Texas death penalty statute had been unsuccessfully challenged on similar grounds only a year prior to *Penry I* in *Franklin v. Lynaugh*, 487 U.S. 164 (1988). Franklin argued the Texas statute was unconstitutional because it did not allow the jury to consider and give effect to his disciplinary record in prison. This Court found that such evidence could be adequately considered within the second statutory punishment issue. *Id.* at 177. The Fifth Circuit made a similar conclusion in *Kelly v. Lynaugh*, and this Court denied certiorari review one week after issuing *Penry I*. *See Kelly v. Lynaugh*, 862 F.2d 1126, 1133, n.12 (5th Cir. 1988), *cert. denied*, 492 U.S. 925 (1989). Given this backdrop, it was not unreasonable for the CCA to conclude that Penry's situation was unique and that *Penry* error existed only when a defendant presented mitigating evidence similar to Penry's, i.e., evidence that his crime was attributable to a uniquely severe permanent handicap, not of his own making, such as mental retardation.

Once trial courts began using nullification instructions, the CCA addressed *Penry I* claims from the view that the nullification instruction provided a constitutionally adequate vehicle by which to give mitigating effect to the defendant's evidence. Indeed, all of the affirmances cited by Smith and amici, save one that will be discussed below, are cases where the CCA concluded that the nullification instruction resolved the *Penry I*

claim.[5] The fact that the CCA did not conduct harmless error analyses in these cases therefore means nothing: according to the CCA, there was no error to analyze.[6]

The remaining case cited by Smith and amici, *Heiselbetz v. State*, 906 S.W.2d 500, is not a charge error case at all. Smith's Reply Brief, p. 13; Appellate Judges' Amicus Brief, p. 10. Rather, Heiselbetz tried unsuccessfully to extend *Penry I* to claims of jury selection error. *Id.* at 508-09. It has no application to this case.

It was not until 2001 that this Court's opinion in *Penry II* struck down the CCA's reliance on nullification instructions. And, of course, in 2004, this Court struck down the screening test and nexus requirement that was the crux of many *Penry I* opinions. *See Tennard*, 542 U.S. at 284. Furthermore, as discussed in the State's original Brief in Opposition, it appears that this Court may now be reconsidering its holding that in most cases the former Texas special issues remain sufficient under the Eighth Amendment because they enable the jury to give "meaningful" effect and consideration to the defendant's mitigating evidence, opting instead for a rule borrowed from Justice O'Connor's dissent in *Johnson v. Texas* that a jury must be allowed to give mitigating evidence "full consideration and full effect." *Smith v. Texas,* 543 U.S. 37, 38, 46 (2004)

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[5] *See Fuller (Tyrone)*, 827 S.W.2d at 936-37; *Fuller (Aaron)*, 829 S.W.2d at 209; *San Miguel*, 864 S.W.2d at 495; *Robertson*, 871 S.W.2d at 710-11; *Wheatfall*, 882 S.W.2d 840-41; *Smith*, 898 S.W.2d 854; *Mason*, 905 S.W.2d at 576; *Goff*, 931 S.W.2d at 551, n.13.

[6] Nevertheless, and contrary to the assertions of opposing counsel that the CCA cases are "devoid of any discussion of harmless error," the CCA in *Goff* did note that the alleged jury charge error would not amount to egregious error or harm under *Almanza*. *Goff*. 931 S.W.2d at 551, n.13; Appellate Judges' Amicus Brief, p. 10. And a concurring opinion in *Goodman*, 816 S.W.2d at 388-89, also speculated that a harmless error analysis would be appropriate for *Penry I* error.

(quoting *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (quoting *Johnson v. Texas*, 509 U.S. 350, 381 (1993)).[7]

In short, not much remains of the CCA's *Penry I* jurisprudence. Opposing counsels' condemnation of the CCA based on a defunct body of jurisprudence is legally unsound. It fails to consider the vast changes made to *Penry* jurisprudence in 2001 and 2004. When the CCA has had the opportunity to consider *Penry* error since those changes have taken place, it has performed the very same *Almanza* harm analysis that it applied in this case. *E.g.*, *Penry v. State*, 178 S.W.3d 782, 788 (Tex. Crim. App. 2005) (*Penry III*) (applying *Almanza* egregious harm analysis where jury charge did not allow jury to consider evidence of mental impairment outside of mental retardation issue).[8] Accordingly, given the changes that have taken place in the CCA's *Penry* jurisprudence, it cannot be said that the CCA's harmless error review in this case was aberrational.

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[7] Smith unjustifiably asserts that the State's position on this issue is ridiculing this Court's articulation of its individualization standard. Smith's Reply Brief, p. 4-5. On the contrary, the State takes issue with *Smith's* clearly erroneous conclusion, based on his citation to one case (this one), that this Court has "repeatedly" insisted the Eighth Amendment requires a jury to give "full" consideration and effect to mitigating evidence. Petition, p. 16.

[8] The amicus brief for four appellate judges goes so far as to insinuate that the CCA applied the egregious harm standard to *reverse* Johnny Paul Penry's third conviction and death sentence in 2005, after this case was remanded, merely so it could later use the Penry reversal to justify its decision in this case. Appellate Judges' Amicus Brief, p. 9; *Penry III*, 178 S.W.3d 782; *see also* Smith's Reply Brief, p. 14.

That a divided, nine-member court would act as a body to sacrifice one capital murder conviction for the possible future affirmance of another capital murder conviction defies logic, has no factual support in this record, and is at odds with the reality of how appellate decisions are made. Moreover, while some vilification of the State of Texas is expected in this case--and is amply provided by Smith and amici to buttress their legal arguments--this particular insinuation crosses the line.

III. Charge error is not generally forfeitable in Texas.

It bears repeating that the lack of an objection to jury charge error, generally speaking, does not forfeit the error on appeal in Texas; it merely requires a more onerous showing of harm for reversal. *Almanza*, 686 S.W.2d at 171-72; *Jimenez v. State*, 32 S.W.3d 233, 237 (Tex. Crim. App. 2000). The opinions cited in note 2, *supra*, all attest to the fact that the lack of an objection to a jury charge does not forfeit the error, but simply requires an analysis for "egregious harm."

Smith relies on *Martinez v. Dretke*, 426 F.Supp.2d 403, 527 (W.D. Tex. 2006), to assert that Texas law "consistently and routinely" defaults federal constitutional challenges to jury instructions on state habeas review, unlike direct appeals. Smith's Reply Brief, p. 11-12. Thus, Smith contends, the CCA's failure to find procedural default in its original habeas opinion amounts to a genuine assessment of Smith's trial objection and a rejection of procedural default. And, the CCA's position on remand that Smith's failure to object at trial requires an "egregious harm" analysis under *Almanza* is, he concludes, a belated effort to revisit the procedural ruling in order to thwart this Court's ruling on the merits.

The federal court opinion in *Martinez* is badly researched. Texas does not "consistently and routinely" default charge error for the lack of a trial objection, even on habeas review. The procedural default argument was raised in *Martinez* by the court *sua sponte*. *Martinez*, 426 F.Supp.2d at 526. It is telling that the assistant attorney general representing the State of Texas did not see the merit of such an argument in that case.

Moreover, none of the many cases cited in *Martinez*, except two that will be discussed below, pertained to jury charge error: *Graves v. Cockrell* involved the procedural default of a due process claim based on the defendant's right to present witnesses on his behalf.[9] *Cotton v. Cockrell* involved the default of error based on the trial judge's comments during voir dire.[10] *Dowthitt v. Johnson* involved the procedural default of an evidentiary complaint.[11] *Muniz v. Johnson* involved the default of a complaint about the prosecutor's jury argument.[12] The procedural default discussion in *Sharp v. Johnson* involved complaints about the admission of evidence, pretrial publicity, and the failure to read the indictment to the jury.[13] The opinion in *Nichols v. Scott* pertained to the prosecutor's jury argument (although there was a *Penry* complaint rejected on the merits in the section immediately preceding the procedural bar discussion).[14] The issues subject to default in *Amos v. Scott* were evidentiary issues and a Sixth Amendment claim.[15] Thus, none of these cases support the holding in *Martinez* that jury charge error is defaulted by the failure to object at trial.

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[9] *Graves v. Cockrell*, 351 F.3d 143, 151-52 (5th Cir. 2003).

[10] *Cotton v. Cockrell*, 343 F.3d 746, 753-54 (5th Cir. 2003).

[11] *Dowthitt v. Johnson*, 230 F.3d 733, 751-52 (5th Cir. 2000).

[12] *Muniz v. Johnson*, 132 F.3d 214, 221-22 (5th Cir. 1998).

[13] *Sharp v. Johnson*, 107 F.3d 282, 285 (5th Cir. 1997).

[14] *Nichols v. Scott*, 69 F.3d 11255, 1278, n.44 (5th Cir. 1995).

[15] *Amos v. Scott*, 61 F.3d 333, 338 (5th Cir. 1995).

One case cited in *Martinez* that actually involved a jury charge complaint contains two egregious flaws in its analysis. In *Rowell v. Dretke*, the state argued that the petitioner defaulted his habeas claim regarding charge error because it was "raised for the first time on habeas."[16] *Rowell* then equates this argument with an assertion of the contemporaneous objection rule. *Id.* at 374. These two concepts are not the same. The procedural bar that results from "raising an issue for the first time on habeas" originates from the notion that habeas review is for extraordinary relief and complaints that could have been raised on direct appeal are not cognizable on habeas. *See Goodman*, 816 S.W.2d at 385 (holding that writ of habeas corpus should not be used to litigate matters which should have been raised on direct appeal). This rule, particular to collateral proceedings, is sometimes referred to as a "cognizability" bar. *Weise v. State*, 55 S.W.3d 617, 619-20 (Tex. Crim. App. 2001). This is different from the contemporaneous objection rule, which forfeits error (for purposes of direct appeals and collateral review) when a defendant makes no objection to the trial court. The former cognizability bar is unaffected by the holding in *Almanza* and could easily be used to forfeit charge error on habeas review. But it is not based on the failure to object at trial.

In addition to this, the *Rowell* opinion cites *Barrientes v. Johnson* for the proposition that the "failure to timely object waives any error in jury *instructions* unless so prejudicial no instruction could cure the error." *Rowell*, 398 F.3d at 374 (emphasis

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[16] *Rowell v. Dretke*, 398 F.3d 370, 374 (5th Cir. 2005).

added). In fact, *Barrientes* involved jury *argument*, not jury instructions, and the rule attributed to *Barrientes* is the rule that applied to jury arguments in Texas until 1996.[17] Inexplicably, the *Martinez* opinion misinterprets *Barrientes* in the same way, holding that it involves a jury instruction complaint when it clearly involves jury argument.

There is one more case upon which *Martinez* relies that warrants separate discussion. *Martinez* cites *Rogers v. Scott* for the proposition that a federal habeas petitioner's failure to comply with Texas's contemporaneous objection rule also bars federal review. *Martinez*, 426 F.Supp.2d at 527. Rogers complained, however, that Texas courts often waived or ignored the contemporaneous objection requirement in *Penry* claims like the one he raised.[18] The *Rogers* court then *excused* the Texas courts' failure to regularly follow the contemporaneous objection rule with respect to *Penry* claims. Thus, *Rogers* is directly at odds with the proposition for which *Martinez* cites it.

Accordingly, the *Martinez* holding that Smith proffers to this Court is unreliable and inaccurate. The State stands by its assertion that, generally speaking, the failure to object to jury charge error in Texas does not forfeit the error, the State's argument on remand notwithstanding. Smith has not found, and will not find, any conclusive authority to the contrary. In fact, the CCA has specifically held in a habeas setting that, when it

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[17] *Barrientes v. Johnson*, 221 F.3d 741, 779 (5th Cir. 2000); *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996) (overruling prior Texas law that the failure to object to jury argument does not waive error if the error is so prejudicial it could not be cured by an instruction to the jury to disregard and replacing it with the general contemporaneous objection rule).

[18] *Rogers v. Scott*, 70 F.3d 340, 342 (5th Cir. 1995).

comes to *Penry* error, Texas courts will not find procedural default based on the failure to raise the issue on appeal *or* the failure to object at trial. *Ex parte Baldree*, 810 S.W.2d 213, 214-215, n.2 (Tex. Crim. App. 1991).

In the face of this unfavorable law, Smith is compelled to complain that the State below argued procedural default on remand. But any competent advocate would argue for a proper *expansion* of procedural default to the facts of this case, given that procedural default as a general rule applies to Texas habeas claims (other than charge error) and that Smith waited until *nine years* after his trial to complain about the his jury charge. In this regard, Smith also protests at length the concurring opinion on remand of Judge Hervey, who would find Smith's claim procedurally defaulted. Smith's Reply Brief, p. 3, 4-5, 10-11,12, 14. While Smith's excessive reliance on these sources may help him build his "bait and switch" conspiracy theory, they provide no legal basis for certiorari review. The State is unaware of any authority that considers the State's brief or concurring opinions to be law in the State of Texas. The fact of the matter is that the CCA majority opinions did not address a procedural default argument in this case, either before or after remand. And if a Texas court has ever defaulted a *Penry* claim based on the defendant's failure to object at trial, surely Smith would have presented it to this Court by now.

Therefore, the CCA's failure to address procedural default in its original habeas opinion does not equate to a decision to reject a procedural default argument. Historically, procedural default has not been applied to claims of charge error or *Penry* error in Texas.

In any event, this entire procedural default argument is an irrelevant detractor. Smith's discussion of procedural default bears on this case only because he contends the CCA made an "about-face" and procedurally defaulted his claim when it conducted its egregious harm analysis on remand. The CCA did not discuss procedural default on remand and its harm analysis was, on its face, a harm analysis like the ones regularly conducted under *Almanza*. The lack of a trial objection merely determined the level of harm required for reversal.

Moreover, as Smith admits, it is a harm analysis more lenient than the harm analysis he would receive under federal law. *Compare Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993); Smith's Reply Brief, p. 8, n. 4. It is also more lenient than the harmless error analysis used generally on state habeas review that the State urged on remand. *See Fierro v. State*, 934 S.W.2d 370, 372 (Tex. Crim. App. 1991) (holding that, traditionally, a habeas corpus review of federal constitutional error that is subject to a harmless error review requires the applicant to show by a preponderance of the evidence that the error contributed to his conviction or punishment).

At its heart, this case is merely a disagreement about which harmless error review should be applied to *Penry II* error in state habeas court, and this Court should deny certiorari review.

IV. Misstated facts in the briefs of amici.

In accordance with Supreme Court Rule 15(2), it is appropriate to note that both amici have incorrectly recited the holdings of the CCA's original habeas opinion.

Appellate Judges' Amicus Brief, p. 4; Constitution Project Amicus Brief, p. 4. The CCA originally made three holdings independently sufficient to deny relief. The majority concluded that (1) Smith did not show evidence of a severe and permanent handicap, not of his own making, which is at least related to the offense, (2) Smith did not show that the disability evidence was beyond the reach of the two special issues, and (3) the nullification instruction in this case was sufficient to accord full weight to Smith's mitigation evidence. Smith's Appendix 2, p. 4, 6, 9. Although clearly set out and subtitled in the CCA opinion, amici entirely overlook this second holding regarding the sufficiency of the two special issues.

It is also necessary to note that the Constitution Project has misrepresented the facts to this Court. Amicus states in its brief, without citing the record, that Smith presented evidence that he had learning "disabilities" and that his father was a "violent drug addict." Constitution Project Amicus Brief, p. 3. In truth, Smith had one learning disability in the form of a speech handicap and there is absolutely no evidence in this case that his father was violent. Smith's Appendix 1, p. 6-7. The evidence of violent behavior in this record pertains only to the acts of Smith in carrying weapons, threatening his teachers, attacking Chris Standmier with a baseball bat, and torturing and murdering Jennifer Soto. Smith's Appendix 1, p. 4-6, 7.

CONCLUSION

The State moves this Court for leave to supplement its Brief in Opposition with the foregoing supplemental argument. For the reasons discussed above and for the reasons asserted in the State's Brief in Opposition, Smith's petition for writ of certiorari should be denied.

Respectfully submitted,

BILL HILL
Criminal District Attorney
Dallas County

LISA SMITH
Deputy Chief, Appellate Division

*KIMBERLY A. SCHAEFER
Assistant District Attorney
Appellate Division

133 N. Industrial Blvd., LB-19
Dallas, Texas 75207-4399
(214) 653-3639
(214) 653-3643 *fax*
kschaefer@dallascounty.org

*Counsel of Record